THE ANCIENT HEBREW LAW OF HOMICIDE*

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I

The law of homicide is an index to certain sides of national character. Where there is a small, powerful class able to monopolize rule and government, the rights of the great mass of common people are weak and ill-assured. In such a society there is much violence. Arrogant and turbulent spirits are in perpetual rivalry, and compete for mastery. The stronger steadily eliminate the weaker. Life is held cheap. The chiefs, who are always risking their own lives, compel their underlings, who have no great stake in the contest, to risk theirs. It is a kind of feudal system, in which each chief is the head of a clan or other organization with whose aid he hopes to retain or to achieve pre-eminence.

Out of such a condition the early laws of homicide arise.

Clans in juxtaposition are never quite at peace with each other. There may be a kind of truce, but this is liable to be broken at any moment. The murder of a clansman by a member of another clan is *casus belli*, for the sufficient reason that it weakens the assailed clan. If unpunished, the act tends to be repeated, and this process would, in a relatively short time, bring the weakened clan under subjection to the aggressor clan.

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In such a state of society the law of retaliation (the *lex talionis*) becomes inevitable. The assailing clan must be weakened as much as the assailed, if the latter is to retain its relative strength and position. What we call *lex talionis* is therefore, primarily, a means for the defence of the clan, an inter-clan rule. It is one of the early stages of what we now call international law, which even yet knows no final arbitrament but the sword.

The period when this rule began to be applied antedates even primitive history. We know of no stage in which men did not form a kind of society, however small or rude it may have been. And so soon as this point has been reached, individual action ceases to be unrestrained, and must accept limitations useful for society. A member of the blood-covenant may no longer slay his fellow-member. However determined his purpose, the *ḥatan damim* (member of the blood-covenant guild) must forgo it when he learns that the intended victim is also a member (Exod. 4. 24–6).[1]

[1] The text, Exod. 4. 23-6, is of great antiquity. It refers to an early state of the law in which for certain offences the penalty of death is imposed on the eldest son of the criminal. If Pharaoh will not let the people go, if he will enslave JHVH's first-born (*bekor*), then JHVH will slay his first-born (*bekor*). This is the primitive *lex talionis*, traces of which are clear in the Ḥammurabi Code, §§ 116, 210, and 230.

This denunciation of punishment against Pharaoh by killing his first-born son brings to the writer's mind an incident in the life of Moses which he then proceeds to relate. Moses has been guilty of some delinquency which was doubtless plainly told in the old narrative but is here omitted. The Rabbis inferred that when Moses married the daughter of Jethro, the latter as a condition of his assent stipulated that the first-born son of the union should be brought up as a Gentile. Hence the boy Gershom was not circumcised (Ginzberg, *Legends of the Jews*, vol. II, p. 328). As JHVH claimed the first-born of all Israel as his, the failure of Moses to circumcise Gershom was to be punished by the death of the latter. The quick mother-wit of Zipporah saved the situation. She circumcised the boy, cast the foreskin at JHVH's feet uttering (for the boy) the proper formula: 'Now

From the very beginning of organized society, there must have developed two sets of laws, one for those within and the other for those without the clan. The latter is simple and short. A member of clan A has weakened clan B by killing one of its members. Clan B must retaliate by weakening the aggressor clan at least as much.

This policy, however wise as against another clan, would be ruinous if applied within the clan. One member has killed another, and has thereby reduced the strength of the clan. If the aggressor be killed, its strength is further reduced. The direct clan-interest is that the aggressor be kept alive, unless he is likely to further imperil the community. It is this contingency which creates a necessity for devising a lesser punishment than death for homicide within the clan, and hence is evolved the system of imposing a money penalty on the homicide—*wergild*. It is this contingency, too, which creates a necessity for ascertaining the circumstances of the tragedy and its underlying motive. Hence follows a subdivision of homicide into murder, which even within the clan may continue to be a capital offence, and manslaughter, which may readily be compounded for.

Two systems of homicide law are thus made more or less co-existent: an external homicide law, which is the *lex talionis*, a kind of war, and an internal homicide law, which seeks to ascertain the very right of each case—what we would call justice.

This co-existence of two discordant systems of law in each of the many clans composing a state or kingdom, tends

art thou of blood-covenant (*ḥatan damim*) with me!' JHVH forbore his purpose. And then follows the explanation that circumcision constitutes blood-covenant, with the necessary implication that blood-covenantees may not for any cause kill each other.

steadily to undermine the *lex talionis*. With the progress of the state, the relations of its several parts become closer and closer, and the comity between them increases. The justice of the internal law becomes more and more apparent, and with the growth of peaceful relations between the several clans, the idea of the unity of the state is strengthened. The feeling which individuals had for their clan is gradually transferred to the state or kingdom, and it is seen that all the clans together constitute one great clan, which is called the state. When this point is reached the *lex talionis* dies a natural death.

This progress, though curtly described, is very slow, and is reached, not by a leap, but by slow stages. For long ages the *lex talionis* continues to be recited as regulating the relations of men within the clan, and yet it is all the while undergoing decomposition. The Code of Ḥammurabi, if taken literally, would present a shuddering spectacle. Its notions of retaliation betoken fierce barbarism. It is reasonably certain, however, that in very early times its crude literalness was modified, and that the law as administered in later ages was far different from the bald meaning of its words. The marked intermediate stage, which is most important in the consideration of our subject, may be called the *wergild* stage, or, to use the Hebrew term, the *kofer* stage.

When a kingdom has travelled a certain distance on the road to unity, it perceives that a state of war between its parts, however mild or modified, is injurious to its progress. The same necessity which compelled the clan to work out an internal homicide law milder than the external homicide law, presses upon the state. For its purposes the several clans cannot be hostile to each other,

but must constitute one great national family. The distinction between external homicide law and internal homicide law cannot exist for it. Human nature, however, is more powerful than governmental logic; ancient notions and customs are not to be done away with in a day, nor can hereditary feuds be converted into brotherly feeling by mere fiat. Force is necessary, and the growing state exerts it to prevent bloody inter-clan feuds. The first mode of prevention is always the insistence on *wergild* between the two clans, that is, the injured clan, instead of going to war, must accept a money composition for the loss of its member. The central state must, however, have acquired great stability and power before it can effect this end.

When this stage is reached, the kingdom has surmounted a danger leading to disintegration. By way of compensation, perhaps, this improvement leads to another danger. Wealth has acquired a new force. It now enables its owner to kill the member of another clan with much less danger to his own life than before. With the growth of a state's wealth this peril grows more and more formidable. Hired assassins will form a class, and individual safety will be greatly impaired. The weakness of the *kofer* system will become more and more apparent, and the moral power of the internal homicide law will make its way.

When the proper point is reached, the state overthrows the *kofer* law and substitutes for it the inquiry into the circumstances and motive of every homicide, which results in the doctrine that homicide is so great an offence against the state that the private wrong is submerged, and that it is incapable of private composition, no matter what the reparation offered. Then only is the state fully organized to carry on a civil government.

We have no adequate means to ascertain when the pre-Hebraic inhabitants of Palestine passed through these stages. The probability is that long before they were conquered by the Hebrews they had reached the *wergild* stage.

The Code of Ḥammurabi of Babylonia (*circa* 2250 B. C.) has as yet no general state-law punishing homicide. This crime must therefore have been under the jurisdiction of recognized constituent elements of the state, such as clans or the like, which severally protected their clansmen's lives against assault from without and within. There are indications that the *kofer* stage had been reached.

The Hebrew tradition is that the state was formed at the crossing of the Jordan; and by the formation of the state we mean that every male Israelite became a member of a great national blood-covenant which, theoretically at least, overrode all ties of family, clan, or tribe. At Gilgal, before the campaign for the conquest of Canaan began, this great covenant between all Israel and JHVH was entered into (Josh. 5. 2–9). Pesaḥ was celebrated (5. 10–12), and JHVH, by special messenger (*sar-ṣeba-JHVH*), ratified the covenant, and in symbolical language welcomed the new-comers to the land of JHVH, which had become holy in fact by the entrance of the covenant people.

In the course of lectures delivered before this College last year, my endeavour was to show that the pre-Hebraic inhabitants of Palestine were politically organized into small city-kingdoms; that the Hebrews, when they conquered the land, accepted the system, but did away with the kings, converting the petty kingdoms into cantons or districts, which continued to be called cities (*'arim*), and that these became the constituent elements of the Hebrew

state, abolishing, in theory at least, the former dividing lines of family, clan, and tribe.

The process of forming this new Hebrew state lasted for more than two centuries. The settlers advanced further and further, coming into closer and closer contact with the natives. Ancient Canaanite modes of thought impregnated the settlers' minds, and both in religion and in law Canaanite views struggled with Hebraic principles. How bitter the contest was the whole Hebrew literature shows. Though in the view of practical statesmen Hebraism in the end triumphed, both in church and state, yet the idealists were so dissatisfied with the Canaanitic alloy, which always more or less manifested itself, that a reader of the prophetic discourses might almost be misled into believing that Baal had borne off the victory from JHVH, and that the ancient codes had crowded out the *Torah*.

Our present task is to show the contest between the Hebrew law on the one side, and the Canaanite practice on the other; to point out that the *ziḳne ha-ʿir*, infected as they were with the old Canaanite notions and practices, had to be restrained and corrected, at first by federal delegates, and when this measure proved inadequate, had to be deprived of large and important items of legal jurisdiction, which were transferred to federal courts, and then to make clear that for the unity of the state it finally became necessary to deprive the *ziḳne ha-ʿir* of all important judicial functions, and to establish a complete system of federal courts, sitting in every *ʿir*, and thus bringing the Hebrew law home to every corner of the kingdom.

In the investigation of this movement we have chosen to begin with the law of homicide, not only because of its fundamental importance, but also because the *Torah* gives

fuller and more detailed information on this branch of jurisprudence than on any other subject of the criminal law. This valuable feature of the *Torah* must not, however, blind us to the fact that its statement of the law on any subject is not exhaustive. The Hebrews had for ages lived a settled pastoral life in a portion of the Egyptian kingdom expressly assigned to them. While subject to the laws of the Empire, they had a numerous community of their own, among whom grew customs and observances which were, in effect, a kind of internal law. The tradition was that they were governed by elders. At the very beginning of the public career of Moses and Aaron, they submitted their plans to this body (Exod. 4. 29–30; 12. 21; 17. 6; 19. 7).

The oral or customary law which thus naturally grew among the Hebrews in Egypt is nowhere recorded. It was a *Torah she-be'al peh*, which, with them, as with all other nations, preceded any written code. Nor did the written code, *Torah she-bi-ktab*, when it came, stop the further development alongside of it, of the old *Torah she-be'al peh*. New and unforeseen circumstances would arise which had to be met by the tribunals, and their decisions, from the time when the Oracle took jurisdiction of certain cases down to the latest period when judges of ordinary law-courts presided, constituted an ancillary body of oral or common law.

We are not without specific evidence on this subject. An examination of the texts of the Pentateuch relating to homicide discloses the fact that their contents are of two diverse kinds, one of them being in the dogmatic form of *mishpaṭim* (statutes), and the other of them *torot*, or summaries of the facts and the law of cases, in the manner of the syllabi of our law reports.

Nor is this a peculiarity of the law of homicide. There are in the *Torah* at least four other instances of reported cases: the case of the blasphemer of the *Shem* (Lev. 24. 10–16), that of the Sabbath-breaker (Num. 15. 32–6), that of Zelophehad's daughters (Num. 27. 1–11), and the second case of Zelophehad's daughters (Num. 36. 1–10). In each of these the facts are narrated and the principle of the decision announced for guidance in the future. They constitute what we call case-law, as distinguished from statute law, and what the Hebrews call *Talmud*, in contra-distinction to *mishpaṭim* or *Torah*. The memory and results of this steady accumulation of case-law during a period of perhaps fifteen hundred years are preserved to a small degree in the Bible, and to a much greater degree in the *Talmud*. It is to be hoped that studies in the vast field of Talmudic literature may give us light on many subjects of which we are, at present, wofully ignorant. We are not able to show the contents of the ancient pre-Mosaic oral law, and cannot therefore pretend to give its provisions in relation to homicide. It is, however, fair to assume that the written law was, in the main, declaratory of the oral law that immediately preceded it. Such, indeed, is the history of law in all ages and among all peoples. The human nature of great masses of people prevents the sudden overturning of a body of ancient habits by mere fiat, and the substitution for them of strange customs contrary to inherited notions.

It is from the written law—from the *Torah*—that we must learn the law of homicide: what constitutes the offence, how the perpetrator is to be ascertained, and when ascertained, how he is to be punished.

Each of the five books of the Torah, from Genesis to

Deuteronomy, contains passages bearing on these interesting questions. The references in Genesis are most widely known and quoted, not because they are parts of any legal code, properly so called, but because they announce broad, general principles, the result of philosophical reflection, and therefore appeal to a large circle who would be repelled by a statement of practical law. From their nature they are fitter for consideration, after we shall have made a study of the book, than as an aid in the preliminary work.

It is from an examination of all this material that we are to learn the Hebrew law of Homicide. This study would, however, be but partial and imperfect unless we shall at the same time endeavour to ascertain the state of the law upon that subject among the people whom the Hebrews conquered. For this there are but two sources: one the Hebrew law itself, in so far as it discloses the nature of the native law which it was combating, and the other the code of Babylonian law, known as the *Ḥammurabi* Code, said to have been promulgated by Ḥammurabi, King of Babylon, about 2250 B. C. It was in the year 1902 that M. de Morgan, while excavating the acropolis of Susa, found three large fragments of a block of black diorite. When joined, they formed a pillar about seven feet high, and tapering from seventy-one inches to sixty-two inches. At the upper end of the front side was a bas-relief representing the seated sun-god Shamash, presenting the code of laws to Ḥammurabi. Then follow on the same side sixteen columns of writing, and on the reverse side twenty-eight columns. On the front side five columns of writing have been erased. When complete the inscription probably contained forty-nine columns, four thousand lines, and about eight thousand words. It is from this inscription

in the Babylonian language that the Code has been carefully studied by experts, many of whom believe that it exerted a powerful influence in shaping legal doctrines and customs in all Western Asia, as far as the Mediterranean Sea. If this view be correct, the Code would be some index at least of the character of the law which the Hebrews encountered and finally overcame.

Before entering on the subject, it may be well to reflect that in the natural course of events, the law of Ḥammurabi must have undergone changes both in Babylonia and in Assyria. All communities must, in a considerable degree, make their laws conform to the necessities of national life, and there is no ground for believing that these great states were, in this respect, exceptional. The fact that the old code was for two thousand years treated with religious reverence is entirely consistent with the obsolescence of some of its provisions.

In discussing this ancient code, I make use of the excellent work of Professor Rogers, *Cuneiform Parallels to the Old Testament* (New York, 1912). The Code of Ḥammurabi is there estimated to have contained two hundred and fifty-two sections, of which thirty-five (those between Secs. 65 and 100) have been erased.

We find but eleven sections in anywise bearing on homicide. They are the following:

Section 153. If a man's wife cause her husband to be killed for the sake of another man, they shall impale that woman.

Sec. 207. (The subject of this section is introduced by the preceding section, which is given here for the better understanding of the matter: *Sec.* 206. If a man have struck a man in a quarrel, and have

wounded him, he shall swear, 'I did not strike him intentionally', and he shall be responsible for the doctor.)

If he die of the blows, he shall swear, and if he be of gentle birth he shall pay one-half of a mina of silver.

Sec. 208. If he be the son of a freedman, he shall pay one-third of a mina of silver.

Sec. 210. (The subject of this section is introduced by the preceding section, 209, which is as follows: *Sec.* 209. If a man have struck a gentleman's daughter and have caused her to drop what was in her womb, he shall pay ten shekels of silver for what was in her womb.)

If that woman have died, they shall put his daughter to death.

Sec. 212. (*Sec.* 211. If through blows he have caused the daughter of a freedman to drop what was in her womb, he shall pay five shekels of silver.)

If that woman have died, he shall pay one-half a mina of silver.

Sec. 214. (*Sec.* 213. If he have struck a gentleman's maid-servant, and have caused her to drop that which was in her womb, he shall pay two shekels of silver.)

If that maid-servant have died, he shall pay one-third of a mina of silver.

Sec. 229. If a builder have built a house for a man, and have not made it strong, and the house built have fallen and have caused the death of the owner of that house, that builder shall be put to death.

Sec. 230. If he have caused the death of a son of the owner of the house, they shall put to death a son of that builder.

Sec. 231. If he have caused the death of a slave of the owner of the house, he shall give to the owner of the house slave for slave.

Sec. 251. If an ox given to goring belong to a man, and have shown to him this vice that he is given to goring, but he have not bound up his horns, and have not shut up his ox, and that ox have gored a man of gentle birth and have killed him, he shall pay one-half of a mina of silver.

Sec. 252. If he be a gentleman's slave he shall pay one-third of a mina of silver.

There is here no hint of a general law of homicide. If a man, having a grudge against another, would hide himself and lie in wait for his coming, and then would fatally stab him in the back, there is nothing in the Ḥammurabi code entailing any punishment for the act.

This means not that such atrocious deeds were approved or condoned, but that the state had not yet accepted as part of its function the protection of the lives of its citizens in general. Nor does it mean that every individual man was left to look out for himself, without help from anybody. No great state could live in such rank disorder. The reasonable inference is that minor corporations, such as families, guilds, or clans, had jurisdiction over homicide. Strangely enough, the Code itself gives no information, direct or indirect, upon the subject. The eleven provisions cited throw no light upon it.

Section 153, punishing by impalement a wife who causes her husband to be killed for the sake of another man, is not a homicide statute in the proper sense of the word. The wife who is to be so horribly punished has not herself committed the murder. She has procured another to do

the deed. There is no provision in the Code for punishing the actual murderer. It is thus seen that the crime of the wife is her treason, her breach of marital fidelity. Indeed, it would seem that if she procured the death of her husband for any cause other than her preference for another man, the statute would not apply.

Sections 207 and 208 refer to quarrels. The law on this subject is, generally, that if a man is wounded in a quarrel, and the party wounding him swears that he did not intend to inflict a wound, he suffers no other penalty than the payment of the doctor's fees. If, however, death ensues, the penalty is adjusted according to the social status of the victim. If he be of gentle birth, the penalty is a half silver mina; if a freedman's son, a third of a silver mina.

In this case the homicide is viewed as accidental. It is not looked on as a crime, but merely as a trespass for which damages must be paid to the representatives of the deceased. As to the amount thus paid, we learn from Section 252 that the conventional value of a slave was one-third of a silver mina. The penalties imposed for accidental homicide were looked upon as mere compensation for loss sustained, and included no punitive element whatever.

Sections 210, 212, and 214 refer to blows inflicted on a gravid woman. The sections are obscure, and no light is thrown upon the peculiarity of a man's striking a woman in that condition. If we fully understood the technical terms of the Code, we would probably conclude that the cases do not refer to a quarrel between the man and woman, but to an accidental blow received by the woman while the men were quarrelling with each other. Be that as it may, if the consequence of the blow be a miscarriage whereby the child is lost, the amount to be paid is, in the case of a gentle-

man's daughter, ten shekels of silver, and in the case of a female slave, two shekels of silver.

If, however, the death of the woman ensues, the punishment is adjusted according to the social status of the victim. If she be a gentleman's daughter, the daughter of the assailant is to be put to death; if she be a freedman's daughter, the assailant pays as compensation one-half silver mina; if a slave, one-third silver mina.

The death penalty thus imposed in one case, not on the perpetrator, but on his daughter, indicates that there is involved no notion of a crime against the state. All the other penalties are paid as compensation to the survivors of the deceased. One may fairly suppose that by this ancient law the father of the deceased woman was entitled to kill the daughter of the assailant, and that this was supposed to be exact compensation. As you have killed my daughter, we will, if I kill your daughter, be even.

It is not the state which inflicts the death-penalty on the innocent daughter, whose father, even, has not committed a crime. If he had struck a man with the same result, he would merely have paid the conventional value of the deceased. The inference is easy that the dead woman's father could barter his right to kill the assailant's daughter for a reasonable *kofer*, to be agreed upon between the parties, or perhaps to be adjusted by a tribunal. The effect of this apparently dreadful law would then be that the assailant could not be discharged by the payment of the conventional half silver mina, but would have to pay punitive damages in addition thereto. The pervasiveness of money damages in the Code would seem to warrant the conclusion that in the course of time the literal meaning of the Code would be modified in this direction.

Sections 229, 230, and 231 refer merely to one class of persons,—builders whose structures fall down and hurt somebody. If the owner is killed, the builder is put to death; if the owner's son is killed, the builder's son is put to death; if the owner's slave is killed, he shall furnish another slave in his stead. There is here no pretence of a crime. The builder has been guilty of an error of judgement, or, at worst, of some degree of negligence. He certainly never intended to kill any one.

The penalties show that the law does not treat the builder as a criminal. Otherwise his son would not, in a certain eventuality, be put to death, while he is allowed to go unpunished.

From the fact that builders are the only class selected for this sort of legislation, there must have been some peculiar reason which is not at present ascertainable.

For the rest, we may be reasonably certain that in course of time the practice of *kofer* also prevailed in this class of cases.

Sections 251 and 252 cover the case of a known goring ox allowed by his master to roam at large without his horns bound. There the owner, by reason of his negligence, must pay to the family the conventional value of a member thereof who has been killed by the ox,—a half-mina of silver for a gentleman, a third for a slave. Punitive damages there are none.

In none of these cases (except perhaps that of the faithless wife) is there any evidence that the state looked upon the acts punishable by death as crimes against the state, or indeed as anything but private trespasses against individuals. Nowhere is there any consciousness that the intent to kill is a proper subject of inquiry, or that the

presence or absence of such intent is of any moment. Nowhere is there a hint of any public duty or any public officer to enforce the death penalty.

The reasonable conclusion is that all of the acts above enumerated, punishable by death (except perhaps that of the faithless wife), were looked upon as mere civil trespasses; many of them, by the very terms of the Code, adjustable by money settlements, and the rest, in the course of time, falling under the same rule.

In their origin these laws were doubtless parts of a comprehensive system of retaliatory jurisprudence. In order to realize this fully, it will be useful to give certain additional sections of that Code, closely related in spirit to those already cited.

Section 116. If the one seized die in the house of him who seized him, of blows or of want, the owner of the one seized shall call the merchant to account, and if it be the son of a freedman that died, they shall put his son to death . . .

Sec. 192. If the son of a chamberlain or the son of a vowed woman have said to the father who reared him or to the mother who reared him, 'Thou art not my father', 'Thou art not my mother', they shall cut out his tongue.

Sec. 193. If the son of a chamberlain or the son of a vowed woman have known his father's house, and have hated the father that reared him and the mother that reared him, and have gone back to his father's house, they shall pluck out his eye.

Sec. 194. If a man have given his son to a wet-nurse, and that son have died in the hands of the wet-nurse, and the wet-nurse, without consent of the father and mother,

have substituted another child, they shall call her to account; and because, without the consent of the father and mother, she has substituted another child, they shall cut off her breasts.

Sec. 195. If a man have struck his father, they shall cut off his hands.

Sec. 196. If a man have destroyed the eye of a gentleman, they shall destroy his eye.

Sec. 197. If he have broken a gentleman's bone, they shall break his bone.

Sec. 200. If a man have knocked out the tooth of a man of his own rank, they shall knock out his tooth.

Sec. 202. If a man have struck the person of a man who is his superior, he shall receive sixty strokes with an oxtail whip in public.

Sec. 205. If a gentleman's slave have struck the cheek of a freedman, they shall cut off his ear.

Sec. 218. If a doctor have operated with a bronze lancet on a gentleman for a severe wound, and have caused the gentleman's death, or have removed a cataract with a bronze lancet, and have destroyed the gentleman's eye, they shall cut off his hand.

Sec. 226. If a brander, without the consent of the owner of a slave, have made a slave's mark unrecognizable, they shall cut off the hands of that brander.

Sec. 253. If a man have hired a man to oversee his field, and have furnished him with seed-grain, have entrusted him with oxen, and have contracted with him to cultivate that field, and that man have stolen the seed or the provender and it be found in his hands, they shall cut off his hands.

Sec. 282. If a slave have said to his master, 'Thou art not my master', they shall call him to account as his slave, and his master shall cut off his ear.

The perusal of these provisions arouses a feeling of repulsion. We are apt to forget the slow steps by which mankind has been educated. It need not be doubted that when primitive man, before organized society, suffered injury at the hand of another, he sought revenge by inflicting on his enemy all the harm he could. The idea of limiting the punishment to the exact measure of the offence betokens the birth of moderation and of justice. The crude notion that human law can make good human wrong is pathetically ineradicable. The *lex talionis* which shocks us is built on this insecure foundation. The experience of mankind shows that in measuring punishments the feelings or desires of the injured party must be brushed aside as irrelevant, and that nothing can be considered but the interests of society as a whole. The realization of this truth has always destroyed the *lex talionis*, that is, has substituted for specific retaliation, in which there is present a spice of personal malice, general retaliation, which punishes the culprit, but only so much and in such manner as comports with the welfare of society.

When we reflect on these things, we shall be the more ready to do justice to the men of the remote past, who were more like us than we are always ready to admit.

The retaliation statutes of Ḥammurabi, which we have quoted, were doubtless produced by the conditions of the time.

The readiness to mutilate men evinced in this series of laws, indicates a callousness that may give a clue to their origin. In the military camp, where power dwells in a single person, and instant obedience is indispensable, the spirit of such laws is generated. It is difficult to believe that they were not, as time went on, modified to suit

a more peaceful environment. Whether this was or was not the case, the fact stands out clear as respects homicide, that under the Ḥammurabi Code the state had not yet conceived it as a crime cognizable by it alone, in which no private right can be recognized, and in which every private wrong has been merged.

There is one other feature of the Ḥammurabi Code which is to be noted, namely, the distinction between a superior class of 'gentleman' and the rest of the people. The distinction is preserved all through the law of homicide and the *lex talionis*. That the Palestinian farmers in the twelfth or thirteenth century B. C. had this sharp distinction of classes is very doubtful. The great probability is that the gentleman's law did not seriously affect them, and that we must look to the common people's law if we would get an idea of the Ḥammurabi influence in Palestine.

From this it appears that though the loss of a gentleman's eye was punished by the loss of the aggressor's eye, and the shattering of a gentleman's limb was punished by the shattering of the aggressor's limb, yet if these trespasses were committed against a poor man, the aggressor paid him one mina of silver (Sec. 198), and if they were committed against a slave the penalty was half the price of the slave, to be paid, of course, to the master (Sec. 199).

The deprivation of a tooth in an equal involved the loss of the aggressor's tooth, but a poor man's tooth was atoned for by one-third of a mina of silver (Sec. 201). The death by blows of a gentleman's gravid daughter entailed the death of the assailant's daughter, but if it was a poor man's daughter who died, half a mina of silver paid for her (Sec. 212), and if she was a slave, one-third of a mina of silver was enough (Sec 214).

Even the doctor who lost his hand when his gentleman patient lost his eye, paid only half the price of the slave if the latter had suffered the same misfortune, the payment, of course, being made not to the victim, but to his master (Sec. 220).

The inference seems reasonable that, if the Ḥammurabi law exerted considerable influence in Palestine, its probable effect was to establish a general custom of money settlements for all kinds of trespasses, from a blow to wilful murder.

As regards the Hebrew law of homicide, you are all familiar with that one of the Ten Commandments which in two words forbids murder, *lo tirṣaḥ* (Exod. 20. 13; Deut. 5. 17). While it, like the other commandments, is a pregnant memorandum of human duty, it can scarcely be called a law, in the ordinary sense, since it denounces no punishment for infraction. In all human societies it has been found that merely telling men what they should do, or what they should refrain from doing, is inadequate to guard society against the hostile acts of individuals dominated by anger, greed, lust and other violent passions. However insistent certain theorists are on trusting to the spiritual strength of every individual to assure his right conduct, practical statesmen and legists have always deemed it necessary to make the element called 'sanction' a necessary feature of law. 'Sanction' means that part of the law which fixes a punishment for its infraction.

It is with the Pentateuchal laws of homicide, which include this indispensable element, that we deal.

The first group of them is found in Exodus, chapters 21 and 22; the second group in Leviticus, chapter 24; the third group in Numbers, chapter 35; the fourth in Deuteronomy,

chapters 4, 19, and 27, and then there is a supplemental group in the Book of Joshua, chapter 20.

We shall now give these texts in full, in the following order: first, the Exodus texts; second, the Deuteronomy texts; third, the Numbers texts; fourth, the Joshua texts; and fifth, the Leviticus texts. In choosing this order of presentation, it is necessary to remark that our purpose is not to ascertain the dates of texts, but the probable course of development of institutions. It may be that there are elements of various ages in the same text, so that one treated lower down may contain material as old or older than one earlier considered. The vast work done by experts in the literary field will enable any one who is interested in that phase of the subject to find ample guidance and instruction.

THE EXODUS TEXTS

Exod. 21. 12–14. He that smiteth a man (*makkeh-ish*) so that he die, shall be put to death. But if a man lie not in wait (*lo ṣadah*), but God deliver him into his hand (*ha-Elohim innah le-yado*), then I will appoint thee a *maḳom* whither he shall flee. If, however, a man come presumptuously (*yazid*) upon his neighbour to slay him with guile (*be-ʿormah*), thou shalt take him from mine altar for death.

21. 20. If a man smite his male or female slave (*ʿabdo o amato*) with a rod (*shebeṭ*) that he die under his hand, *naḳom yinnaḳem* (he must be punished).

21. 21. But if he continue a day or two, *lo yuḳḳam* (he need not be); it is his money (*kesef*).

21. 22. If men strive and hurt a woman with child so that her fruit depart, but no *ason* follow, *ʿanosh ye-*

'anesh (he shall pay a fine) according to the claim of the woman's husband so far as it may be approved by the judges (*we-natan bi-flilim*).

21. 23. But if *ason* follow, then thou shalt give *nefesh taḥat nefesh* (life for life).

21. 24. Eye for eye, tooth for tooth, hand for hand, foot for foot,

21. 25. Burning for burning, wound for wound, stripe for stripe.

21. 28. If an ox gore a man or a woman that they die . . .

21. 29. And the ox were wont to push with his horn in time past, and the owner was told of it and has not kept him in, then if he has killed a man or a woman, the ox shall be stoned and his owner also shall be put to death (*yumat*).

21. 30. If, however, a *kofer* be acceptable (to the injured family), he may pay it and save his life.

21. 31. In the case of a son or daughter so killed, the law (*mishpaṭ*) is the same.

21. 32. In the case of a male or female slave so killed, he shall pay the master thirty shekels of silver and the ox shall be stoned.

22. 1 (2). If a thief be found breaking in and be smitten so that he die, for him there is no *damim* (blood-guilt).

22. 2 (3). Unless the sun have risen, in which case there is *damim* (blood-guilt) for him.

The Deuteronomy Texts

The Deuteronomy texts are as follows:

Deut. 4. 41. Then Moses set apart three cities east of Jordan.

4. 42. That the *roṣeaḥ* might flee thither who should kill his neighbour *bi-bli-da'at* (unwittingly), not hating

him (*lo sone-lo*) before, and fleeing to one of these cities may live.

4. 43. Bezer (in the wilderness) in the plain country of the Reubenites;
Ramoth (in Gilead) of the Gadites, and
Golan (in Bashan) of the Manassites.

19. 2. Thou shalt set apart three cities in the midst of the land which JHVH thy *Elohim* giveth thee (Canaan, the land west of Jordan).

19. 3. Thou shalt construct a road, thou shalt divide thy land into three districts, that every slayer (*roṣeaḥ*) may flee thither (*la-nus shamah*).

19. 4. This is the law of the slayer (*debar ha-roṣeaḥ*), who shall flee thither that he may live:
Whoso killeth his neighbour *bi-bli-da'at* (unwittingly), not hating him (*lo sone-lo*) before.

19. 5. As a man goeth with his neighbour to the forest to fell trees, and his hand fetcheth a stroke to cut down a tree, and the head slippeth from the helve and hit his neighbour that he die, he shall flee to one of these cities that he may live.

19. 6. Lest the *go'el ha-dam* pursue the *roṣeaḥ* while his heart is hot and overtake him, because the way is long, and slay him (*we-hikkahu nefesh*), though it was not a case for capital punishment (*mishpaṭ mawet*); he not hating him before.

19. 7. Wherefore . . . set apart these three cities.

19. 10. Let not innocent blood (the blood of the *naḳi*, *dam naḳi*) be shed in thy land which JHVH, thy *Elohim*, giveth thee for an inheritance, and thus blood-guilt (*damim*) come upon thee.

19. 11. If a man hate his neighbour and lie in wait for

him (*we-arab lo*) and come upon him (*we-ḳam ʿalaw*) and kill him, and then fleeth to one of these cities.

19. 12. The *ziḳne-ʿiro* shall send and fetch him thence and deliver him into the hands of the *go'el ha-dam* that he may die.

19. 13. Pity him not, but put away *dam ha-naḳi* (blood-guilt for the innocent) from Israel, that it may go well with thee.

19. 15. One witness (*ʿed eḥad*) shall not be heard against any man for any *ʿawon* (crime) or *ḥaṭṭat* (misdemeanour) with which he may be charged. By the mouth of two *ʿedim* or of three *ʿedim* shall the matter (*dabar*) be established.

The Numbers Texts

The Numbers texts are as follows:

Numb. 35. 11. Ye shall appoint you cities to be cities of refuge (*ʿare miḳlaṭ*) for you, that the slayer (*roṣeaḥ*) may flee thither who killeth any person unwittingly (*bi-shgagah*).

35. 12. And they shall be unto you cities for refuge (*le-miḳlaṭ*) from the *go'el*, that the slayer (*roṣeaḥ*) die not, until he appear before the *ʿEdah* for judgement.

35. 13. And of these cities which ye shall give there shall be six *ʿare miḳlaṭ*.

35. 14. Ye shall give three cities east of Jordan and three cities in the land of Canaan, which shall be *ʿare miḳlaṭ*.

35. 15. These six cities shall be for *miḳlaṭ* for the Bne-Israel for the *ger* and for the *toshab* among them, that any *makkeh-nefesh bi-shgagah* may flee thither.

35. 16. If he smite him with an instrument of iron that he die, he is a *roṣeaḥ*; *mot yumat ha-roṣeaḥ*.

35. 17. If he smite him with a stone, wherewith he may die, he is a *roṣeaḥ*; *mot yumat ha-roṣeaḥ*.

35. 18. Or if he smite him with a hand-weapon of wood wherewith he may die, he is a *roṣeaḥ*; *mot yumat ha-roṣeaḥ*.

35. 19. The *go'el ha-dam* shall put the *roṣeaḥ* to death; (*be-fig'o bo*) when he meets him he shall put him to death.

35. 20. Or if he thrust him of hatred (*be-sin'ah*) or hurl at him by lying in wait (*bi-ṣdiyah*) and he die;

35. 21. Or if in enmity (*be-ebah*) he smite him with his hand that he die, the smiter (*ha-makkeh*) shall be put to death (*mot yumat*); he is a *roṣeaḥ*.

35. 21 b. The *go'el ha-dam* shall put to death the *roṣeaḥ* when he meets him (*be-fig'o bo*).

35. 22. But if he struck him suddenly without enmity (*belo-ebah*) or have hurled a weapon at him (*belo-ṣediyah*) without lying in wait,

35. 23. Or without looking (*beli-re'ot*) let fall upon him a stone wherewith a man may die and he die, not being his enemy (*oyeb*), nor seeking to harm him:

35. 24. The *'Edah* shall judge (*we-shafeṭu*) between the *makkeh* (slayer) and the *go'el ha-dam*, in accordance with these *mishpaṭim*.

35. 25. The *'Edah* shall deliver the *roṣeaḥ* from the hand of the *go'el ha-dam*, and the *'Edah* shall deliver him to his *'ir miḳlaṭ* whither he had fled, and there he must abide until the death of the *kohen ha-gadol* (who has been anointed with the *shemen ha-ḳodesh* (holy oil)).

35. 26. If a *roṣeaḥ* go out of the bounds (*gebul*) of his *ʿir miḳlaṭ*, whither he had fled;

35. 27. And the *goʾel ha-dam* come upon him (*maṣa*) beyond such bounds, the *goʾel ha-dam* may put the *roṣeaḥ* to death (*we-raṣaḥ*). There will be no blood-guilt for him (the *roṣeaḥ*) (*en lo dam*). Cp. Exod. 22. 1, 2 (2, 3).

35. 28. For he should have remained in his *ʿir miḳlaṭ* until the death of the *kohen ha-gadol*. Only after the death of the *kohen ha-gadol* may the *roṣeaḥ* return to his *aḥuzzah*-land.

35. 29. So these shall be for you *huḳḳat-mishpaṭ* in all your *moshabot*.[2]

35. 30. A *makkeh nefesh*: By the utterance of witnesses (*lefi ʿedim*) shall he (the *goʾel ha-dam*) put to death (*yirṣaḥ*) the *roṣeaḥ*. One witness may not testify in a capital case (*be-nefesh la-mut*).

35. 31. Take no *kofer* for the life of a *roṣeaḥ*, who has been sentenced (*rashaʿ*) to death (*la-mut*); he must be put to death (*mot yumat*).

35. 32. Moreover, take no *kofer* from one that hath fled to his *ʿir miḳlaṭ* to permit his return into the canton (*ba-areṣ*) (from the federal city) before the death of the *kohen*.

35. 33. Ye shall not pollute the land wherein ye are: for blood-guilt (*ha-dam*) pollutes the land, and the land cannot be purified of the blood (*lo-yekuppar la-dam*) shed in it, save by the blood of him that shed it (*shofek*).

[2] For *moshabot*, comp. Lev. 23. 21, 31; Num. 15. 2; and especially Num. 31. 10; Ezek. 6. 6, where the several cities are conceived as constituent parts of larger districts called *moshabot*.

THE JOSHUA TEXTS

Josh. 20. 2. Speak to the Bne-Israel, thus: Appoint *ʿare ha-miḳlaṭ* whereof I spoke to you through Moses.

20. 3. That the *roṣeaḥ* may flee thither (*makkeh-nefesh bi-shgagah bi-bli daʿat*); they shall be for you *miḳlaṭ* from the *go'el ha-dam*.

20. 4. When he that fleeth to one of these cities stands (*ʿamad*) at the gate (*petaḥ shaʿar haʿir*), he shall state his case (*debaraw*) to the *ziḳne ha-ʿir* of that city. They shall receive him into the city, and assign him a place of abode.

20. 5. If the *go'el ha-dam* pursues him (and demands his surrender), they shall not deliver the *roṣeaḥ* into his hand, for he smote his neighbour unwittingly (*bi-bli-daʿat*), not hating him before.

20. 6. He shall abide in that city until he stand (*ʿadʿomdo*) before the *ʿEdah* for judgement (*la-mishpaṭ*) (and if the judgement be in his favour) till the death of the *kohen ha-gadol* for the time being. Then shall the *roṣeaḥ* return to his city and his home (to the city whence he had fled).

20. 7. The cities appointed (*wayaḳdishu*) were:
Kedesh in Galilee, in Mount Naphtali;
Shechem, in Mount Ephraim; and
Kiryath Arba (which is Hebron) in Mount Judah.

20. 8. And east of Jordan:
Bezer in the wilderness upon the plain of the Reuben tribe;
Ramoth in Gilead, of the Gad tribe; and
Golan in Bashan, of the Manasseh tribe.

20. 9. These are the *ʿare ha-muʿadah* for all the Bne-Israel and for the *ger* who sojourns among them to

flee thither—every *makkeh-nefesh bi-shgagah*—that he die not by the hand of the *go'el ha-dam* until he stand (*'ad'omdo*) before the *'Edah*.

THE LEVITICUS TEXTS

Lev. 24. 17. He that killeth any man (*kol-nefesh adam*) must be put to death (*mot yumat*).

24. 21. . . . He that killeth a man (*makkeh adam*) shall be put to death (*yumat*).

In approaching the examination of these important texts, it is well to keep in mind that our object is to ascertain the view of the Hebrew mind upon homicide in general. We wish to learn, first, whether it was viewed as a trespass against private persons, and therefore adjustable by those immediately interested, or whether, on the other hand, it was viewed as a crime of such gravity against the state that the private wrong incident thereto was extinguished by being merged in the injury inflicted on the state.

We ought, secondly, to determine what tribunal or tribunals had jurisdiction of the matter, and the manner of their procedure.

Our third point will be to discover what we may respecting the execution of the judgement, and, incidentally, to learn the modes of punishment that were practised.

These inquiries, of course, relate to homicide as a legal wrong, and not to excusable or justifiable homicide.

It is obvious that the killing of a public enemy in war does not constitute the offence, since such enemy, so far from being within the peace or protection of the state, is under its ban, as one whom it is useful and meritorious to destroy. Blood so shed is called war-blood (*deme milḥamah*) (1 Kings

2. 5), and for its shedding no blood-guilt (*damim*) arises either against the individual slayer or against the community.

A striking example of this doctrine, which persists even to our own day, is given in the thirty-first chapter of Numbers. War having been declared against Midian, the arch-enemy of Israel, the army gained a great victory. When the officers reported their action, Moses was wroth with them, because they had spared alive some that he deemed the most dangerous of Israel's foes.

Curiously enough, with this view of the matter there was mingled another sentiment at variance with the first. Though it was the army's duty to slay enemies at war with the state, yet even this high purpose did not relieve the slayer from the necessity of purifying himself, there being implied in this the thought that homicide, however justifiable or meritorious, is never quite blameless.

'Do ye abide without the camp seven days: whosoever hath killed any person, and whosoever hath touched any slain, purify yourselves (unsin yourselves, *tithaṭṭe'u*, from *ḥeṭ'*, sin) on the third day and on the seventh day, and also your captives' (Num. 31. 19).

The peace or protection of the state was, in ancient Hebrew law, supposed to be conferred, not only by the state directly, but by the several cantons or districts as representing the sovereignty of the state, and also by the king himself as the personal incarnation of the sovereignty.

One of the striking episodes of Hebrew history illustrates this: Abner was the general-in-chief of King Saul's army, and cousin to the king. After Saul's death and David's assumption of the crown of Judah, it was Abner who sought to perpetuate the dynasty of Saul by crowning Ishbosheth king over Israel. Civil war followed, Abner leading the

forces of Saul, and Joab the army of David. They met at Gibeon, and Abner was defeated and started to retreat. Asahel, a younger brother of Joab, started in pursuit, flaming with desire to meet the great warrior in single combat. The latter declined, but the fiery youth would not abandon his purpose, whereupon Abner accepted his challenge and slew him (2 Sam. 2. 8–23).

Subsequently, Ishbosheth quarrelled with Abner, and the latter, out of revenge, offered to David his sword, and his influence to make the King of Judah King of all Israel. His negotiations to that end being largely successful, he, at David's invitation, visited the latter's capital, Hebron, to close the matter. David received him with great honour, and when the treaty was concluded, dismissed him, and he went 'in peace' (*be-shalom*) (2 Sam. 3. 21, 22).

When Joab returned from an expedition and learned what had happened, he was in a fury, and angrily chid his royal master for what he deemed a piece of atrocious folly. He did not stop there, but sent lying messengers after Abner to lure him back by a pretended message from King David. They succeeded too well. Joab met him at the gate of Hebron in pretended amity and stabbed him to death (2 Sam. 3. 23–7) under the pretence that the hostilities which caused Abner to slay Joab's brother Asahel were not yet ended.

David's indignation was boundless, but he was powerless to break with the great chieftain. When, however, his death was near and he communicated his last wishes to his son Solomon, he charged the latter not to let Joab's hoar head go down to Sheol in peace (*be-shalom*), because he shed war-blood (*deme-milḥamah*) in peace (*be-shalom*) (1 Kings 2. 5).

The moral of this is plain. Though Judah and Israel had not formally concluded peace at the time of Abner's death, yet the latter was in treaty with David, had visited Hebron on the latter's assurance, in short, was in the king's peace and under his protection, and so being, was foully murdered by Joab.

This doctrine of the king's peace, or the peace of the state, as a protection against homicide, is of the first importance, since its rise marks the era when homicide, from being a private wrong, has become the concern of the state.

An interesting old text, belonging to the *zikne ha-'ir* law, well illustrates that the doctrine had at an early period penetrated to every corner of the state. It is contained in Deuteronomy (21. 1–9).

One is found slain in the field. There is no clue to the murderer. The peace of the state has been violated. As the cities are near each other, accurate measurements must be made in order to ascertain the distance between the place of the crime and the various adjacent cities. Comparison of these distances establishes which is the nearest, and upon it rests the immediate responsibility. In the language of the day, the blood-guilt (*dam*) is upon it, and in order to be relieved of this burden (forgiven, *nikkaper*), solemn ceremonial disavowal is necessary. The *zekenim* measure (21. 2); they wash their hands over the sacrificed heifer (21. 6); they make their solemn protestation of innocence and ignorance: 'Our hands have not shed this blood; our eyes have not seen' (21. 7). And although in one verse (3) the *shofetim* are brought in, and in another (5) the *kohanim bne-Levi* appear, they seem to have nothing to do. Indeed, verse 5 is a commentarial exposition of

a reason for inserting the *kohanim bne-Levi*, and runs thus: 'For them JHVH thy *Elohim* hath chosen to minister unto him and to bless by the *Shem* of JHVH, and by their pronouncement shall every controversy (*rib*) and every assault (*nega'*) be decided.'

That this general assumption of responsibility for a man's life was assumed by the state itself, is clear from such passages as these:

'That *dam naḳi* be not shed in thy land, which JHVH thy *Elohim* giveth thee for an inheritance, and so blood-guilt (*damim*) be upon thee' (Deut. 19. 10).

'Thou shalt put away *dam ha-naḳi* (the blood-guilt for the innocent) from Israel' (Deut. 19. 13).

Perhaps the most striking passage on this subject is Genesis 9. 5: 'Your life-blood will I require from beast and man, from every man's brother (*ish aḥiw*) will I require the life of a man.'

The doctrine of double blood-guilt is here clearly indicated. There is first, the primary blood-guilt incurred by the perpetrator, which is expressed by the first half: 'Your life-blood will I require from man (*mi-yad ha-adam*)', i. e. from the slayer. Then follows the secondary blood-guilt of the whole community, whose bounden duty it was to prevent, or at least to punish, the crime: 'At the hand of every man's brother (*ish aḥiw*) will I require the life of man.'

By this expression, *ish aḥiw*, is meant the community as a whole. Instances of its use in this sense are abundant, as the passages here indicated will show: Exod. 10. 23; 16. 15; Lev. 25. 46; Num. 14. 4; 2 Kings 7. 6; Jer. 13. 14; 25. 26; Ezek. 4. 17; 24. 23; 33. 30; 47. 14; Hag. 2. 22; Zech. 7. 9, 10; Mal. 2. 10; Neh. 5. 7.

The killing of a public enemy in war is, however, not the only form of justifiable homicide. A person condemned to death by law may, by virtue of such condemnation, be killed by the person or persons designated by law, and as such killing is the performance of a public duty, no blame attaches therefor. In the case of Achan, who was condemned to death by the oracle, the execution is fully described. Joshua and the great council (*Kol Israel*) took the condemned to the place of execution. Joshua announced his doom in JHVH's name, and *Kol Israel* stoned him to death (Josh. 7. 24, 25).

In the case of the blasphemer of the *Shem*, JHVH Himself gave directions for the execution by the *'Edah*. Moses communicated them to the *'Edah* (*bne-Israel*), and they stoned the convict to death (Lev. 24. 14, 23).

In the case of the sabbath-breaker, JHVH himself directed that *Kol ha-'edah* should stone him to death, and they did so (Num. 15. 35, 36).

One convicted of manslaughter may, if he break the bounds of his prison city, be lawfully executed. Such execution is justifiable. It creates no blood-guilt (*en lo dam*) (Num. 35. 27).

Another case of justifiable homicide is when a man defends himself against attack which endangers his life or his home. If a man kills a burglar at night (before sunrise) while breaking in, such killing is justifiable. It creates no blood-guilt (*en lo damim*) (Exod. 22. 1 (2)).

We may at this point pause and, before going further, sum up the contents of this introductory lecture.

The Hebrews in Egypt had some form of internal government and communal law. The latter was orally

transmitted, and presumably much of it was incorporated in the subsequent written law. When they conquered Palestine, they could not at once enforce this law, because the *zikne ha-ʿir* of the various cantons had to reckon, or thought they had to reckon, with the indigenous law which was familiar to the large mass of Canaanites who continued to dwell among them. The federal delegates who were sent to the various cantons never succeeded in procuring real compliance with the Hebrew law in many important matters. Probably during the reign of Solomon began a determined effort at a thorough law reform which should sweep away the local customs and establish the supremacy of the federal law. This movement, which lasted perhaps a hundred years, ended in the final triumph of the federal law, though the disruption of the monarchy during that period retarded the full success of the movement in the Northern Kingdom.

It is the history of this struggle for law-reform which we shall endeavour to unravel from the texts.

(To be continued.)